IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1821 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

RAMDEV FOOD PRODUCTS PRIVATE LIMITED - Applicant(s)

Versus

THE STATE OF GUJARAT - Respondent(s)

==========

Appearance :

MR CHETAN K PANDYA for Applicant(s) : 1,
MR SS PATEL, A.P.P. for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 17/02/2006

CAV JUDGMENT

1. The petitioner has, by this petition filed under Article 226 of the Constitution of India, made a prayer to issue a writ of mandamus or a writ of certiorari or any other appropriate order for quashing and setting aside the order dated 16.08.2005 passed by the learned Judicial Magistrate, First Class, Sanand directing the

Police Sub Inspector of Sanand to inquire U/S.202 of Code of Criminal Procedure, 1973, into the complaint lodged by the petitioner against fourteen accused named therein for alleged commission of offences U/S.409, 420, 406, 467, 468, 471 r/w. Sec.120-B and 114 of Indian Penal Code and submit report to the Court within 30 days and has further prayed the Court to direct the Police Sub Inspector, Sanand Police Station to investigate U/S.156(3) of the Code of Criminal Procedure, 1973 (in brief 'Code').

2. The facts of the case emerging from the record are that the petitioner filed a complaint in the Court of learned Judicial Magistrate, First Class, Sanand against fourteen accused named therein for the offences alleged to have been committed U/Ss.419 420, 460, 467, 468, 471 r/w. Secs. 120(B), 34 and 114 of Indian Penal Code interalia on the ground that the petitioner had permitted one M/s. New Ramdev Masala Factory wherein accused no.1 Mr. Jasvantbhai Somabhai Patel was one of the partners to use the trademark “Ramdev” for a period of seven years pursuant to user agreement dated 4.6.1990, but the factory of M/s. New Ramdev Masala was closed from 30.05.1994 which is clear from the affidavit filed before Sales Tax Department and the Income

Tax Returns and thus, there was no business in the name and style of M/s. New Ramdev Masala Factory. According to the petitioner, the accused no.1 joined the petitioner company as General Manager and borrowed some amounts for his personal use from the company and gave eight cheques against the repayment of the said amount but the cheques were dishonoured when presented for encashment and therefore, complaints under the Negotiable Instruments Act were filed as well as a civil suit was also filed for the recovery of outstanding amount. It is averred in the complaint that in the civil proceedings, the Court granted conditional leave to defend the suit to the accused no.1 which order was challenged before this Court which was confirmed and Letters Patent Appeal, filed against the order of the learned Single Judge of the High Court was also dismissed. As per the complaint, the accused no.1 had executed forged partnership documents with the help of other accused and therefore, accused have committed offences enumerated in the compliant. In the complaint, a prayer was made to direct investigation U/S.156(3) of the Code. The learned Magistrate after verification refused investigation U/S.156(3) of the Code and ordered the Police Sub Inspector, Sanand to make inquiry U/S.202 of the

Code and submit a report within 30 days to the Court, giving rise to this petition.

3. Mr.Raju, learned counsel for the petitioner submitted that the complainant is the owner of the trademark whereas the accused had created forged documents with a view to usurping the trademark as those documents which are in possession of the accused are required to be seized, investigation U/S.156(3) should have been ordered. According to him, the reasons assigned by the learned Magistrate are not germane for ordering inquiry U/S.202 of Code of Criminal Procedure, 1973 and as the learned Magistrate has not properly exercised the discretion, the petition should be allowed. It is argued that there is non-application of mind and as custodial interrogation would be required, necessary direction should be issued to investigate complaint of the petitioner U/S.156(3) of the Code.

4. Learned Additional Public Prosecutor Mr. Patel has not made any oral submissions and stated at the Bar that the Court may pass appropriate order.

5. Having heard the learned Counsel of the

petitioner and considered the record, I find from the findings recorded by the learned Magistrate that he has considered the averments made in the complaint as well as documents produced along with complaint.

6. It can be seen from the record of the case that impugned order is passed by the learned Magistrate on 16.8.2005 and this petition is filed on 22nd December 2005 i.e. after almost about four months. It is well settled that power of High Court to issue an appropriate writ under Article 226 of the Constitution of India is discretionary and it cannot be claimed as a right. If the relief claimed is relating to the enforcement or protection of fundamental right, the Court has to grant it when infringement of such right is established, but, if the relief is claimed for any other purpose, it is discretionary to grant or to refuse such relief. Delay is one of the grounds for refusing the discretionary relief under Article 226 of the Constitution of India. If the petitioner wants to invoke the extra ordinary remedy, he should have come to the Court at the earliest opportunity. Delay in resorting to such remedy will be a good ground for refusing to exercise the discretion. The petitioner has not given any

explanation with regard to the delay. Therefore, on the ground of delay itself, the petitioner is not entitled to discretionary relief under Article 226 of the Constitution of India.

7. The learned Magistrate while passing the order has considered the averments made in the complaint as well as documents produced by the petitioner and after assigning reasons, has refused prayer to direct investigation U/S.156(3) of the Code. It is settled proposition that while hearing petition U/S.226 of the Constitution of India, the High Court does not exercise jurisdiction of an appellate Court. Therefore, when the Court below has rendered decision after appreciation of facts, the High Court would not interfere under the special jurisdiction conferred by Article 226 unless such decision is arbitrary or suffers from other infirmities. If the decision is a result of assessment of all the relevant factors, it is not for the High Court to issue a writ to quash the decision of the lower Court merely on the ground that another view in the matter is possible.

8. The complainant had, in the complaint, requested the Court to order investigation U/S.156(3) of Code of Criminal Procedure, 1973.

However, the learned Magistrate has, in his impugned order, observed that the complainant had gone to the police station to file the complaint and this complaint is filed only after the police had refused to register the complaint. According to the learned Magistrate, this vital fact is not stated in the complaint. This statement of fact is not shown to be factually wrong by the learned counsel of the petitioner. The learned Magistrate, after referring to the civil litigation between the parties which had gone up to the Supreme Court, has held that the disputes raised in the compliant are of civil nature. The learned Magistrate has concluded that the documents referred in the complaint were produced before Civil Courts and in the office of Trade Mark Registry and the question whether those documents were forged or not can be ascertained by getting opinion of hand writing expert. In view of these findings, the learned Magistrate has refused investigation U/S.156(3) of the Code which cannot be regarded as arbitrary or erroneous. It is very strange that though the police has refused to register the complaint, the complainant is still insisting for investigation by the police. This creates a doubt about the bonafides of the complainant.

9. Under Sec.202 of Code of Criminal Procedure, 1973, any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance, may, if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police office for the purpose of deciding whether or not there is sufficient ground for proceeding. Therefore, the scope of inquiry is for the limited purpose of finding out whether a *prima facie* case for issue of process has been made out by the complainant. The provisions have given wide discretion in the matter of ordering an inquiry. As explained by the Supreme Court in ***Mohinder Singh Vs. Gulwant Singh*** reported in ***AIR 1992 SC 1894*** and ***Dr. S.S. Khanna Vs. Chief Secretary*** reported in ***AIR 1983 SC 595***, the scope of inquiry under Sec.202 of the Code is extremely restricted to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not U/S.204 of the Code or whether the complaint should be dismissed by resorting to Sec.203 of the Code, on the footing that there is no sufficient ground for proceeding on the basis of the statements of the complainant. In view of suppression of material fact in the complaint and civil disputes between

the parties, the course adopted by the learned Magistrate to order investigation U/S.202 cannot be regarded as arbitrary or erroneous at all. The learned Magistrate has after considering the facts and application of mind, ordered investigating U/S.202 and therefore, the petition is liable to be dismissed.

10. The learned advocate for the petitioner has relied on the decision of this Court in the case of ***Sureshkumar Gupta Vs. State of Gujarat and Another*** reported in ***1997 (2) G.L.H. 256*** to emphasis that investigation U/S.156(3) should have been ordered. In the said decision, this Court has laid down the principles as to when investigation U/S.156(3) should be ordered. It is held that when a complaint is received, the Magistrate has to notionally decide and has to come to a tentative decision on application of mind as to whether evidence to prove case can be procured by Court and whether the complainant can produce evidence without the help of the police agency. It is further held that the Magistrate shall record a short order disclosing the reason why he needs investigation U/S.156(3) of the Code of Criminal Procedure, 1973 through police agency and why he is unable to try himself. In this case, the learned Magistrate has, after going

through the material, passed the impugned order and the decision relied on has no applicability to the facts of this case.

11. The learned advocate for the petitioner has also relied on the decision in case of ***Harshadbhai C. Patel V/s. Indravadan P. Shah and Another*** reported in ***1986(2) G.L.R. 643*** wherein this Court has held that once on private complaint, a Magistrate takes cognizance of an offence, he can pass an order of police inquiry U/S.202 of Code of Criminal Procedure, 1973 but cannot send the complaint to the police U/S.156(3) of Code of Criminal Procedure, 1973, unless in the absence of such investigation, the material evidence cannot be gathered. In this case as observed by the learned Magistrate, documents referred to in the complaint are already produced in civil litigation and before Trade Mark Authority. Therefore, principle laid down in this decision is not applicable to the facts of the case.

12. Again, in the case of ***Shantilal Mohanlal Shah V/s. Chandrakant Ambalal Thakkar and Another*** reported in ***1987 (2) G.L.R. 784*** relied upon by the learned Counsel, this Court has held that where a private complaint lodged by a citizen, is

sent to the police and the police after investigation submits a chargesheet, the Court must be deemed to have taken cognizance on a police report U/S.178 and not U/S. 190(a) of the Code of Criminal Procedure, 1973. In my view, this judgment is not applicable to the facts of the present case. In ***Arvindbhai Ravjibhai Patel V/s. Dhirubhai Shambhubhai Kakadiya*** reported in ***1997(2) G.L.R. 1572***, this Court has directed the Magistrates in the State not to order police investigation in a mechanical manner and therefore, impugned order is not liable to be interfered with.

13. In view of this, the petition cannot be entertained and is dismissed. Notice is discharged.

[BANKIM N. MEHTA, J.]

#Dave